FILED
JUN 7 1950
CHARLES ELMORE CROPLEY
CLERK

No. 118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

CHARLES RALPH JOHNSTON,
Petitioner,

vs.

DAVID McINTEE, etc., et al.,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

CHARLES RALPH JOHNSTON
and HECTOR A. BROUILLET
Attorneys for Petitioner
11 South La Salle Street—835
Chicago 3, Illinois

The Scheffer Press, Inc.—FInancial 6-2694

INDEX

PAGE

Summary and Short Statement 1

Basis for Jurisdiction of this Court 5

Questions Presented 5

Reasons for Allowance of Writ 6

Brief Supporting Petition 9

- Opinions below 9
- Jurisdiction 9
- Statement of the Case 9
- Specification of Errors 10
- Argument 11
  - I. 11
  - II. 12
  - III. 13

Conclusion 13

Table of Cases.

Anderson v. Yungkau, 329 U. S. 482 ..... 4, 5, 8, 12

Barnes v. Alexander, 232 U. S. 117 7

Brown v. Fletcher, 235 U. S. 589, 237 U. S. 583 7

Cent. Ill. Elec. & Gas Co. v. Mfrs. Fin. Co., 299 U. S. 549 7

Chase Nat. Bank v. Sayles, 11 F. 2d 948, cert. den, 273 U. S. 708 8

Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473 7

Dryden v. Land Investment Co., Inc., 127 F. 2d 586 ..... 6, 11

Dulles v. Crippen Mfg. Co., 156 F. 706 8

PAGE

Edward B. Marks Music Co. v. Jerry Vogel Music Co., 140 F. 2d 268 7

Foss v. Peoples Gas Light Co., 241 Ill. 238 8

Fourth Street Nat. Bank v. Yardley, 165 U. S. 634 7

George Adams & Frederick Co. v. South Omaha Nat. Bank, 123 F. 641 8

Haas v. Rendleman, 62 F. 2d 701, cert. den. 289 U. S. 750 7

Hood v. Bell, 84 F. 2d 136 ..... 6, 12

In re Noble, 21 Fed. Supp. 840 8

Kardo v. Adams, 231 Fed. 950 7

O'Keefe v. Cannon, 52 Fed. 898 8

Rogers v. Pennobscot Mining Co., 154 F. 606 8

Talmadge v. U. S. Shipping Board, 54 F. 2d 240 7

Walker v. Brown, 165 U. S. 654 7

Western Powder Mfg. Co. v. Brewerton Coal Co., 81 F. 2d 85, cert. den. 7

STATUTES AND RULES.

Rule 12, Federal Rules of Civil Procedure 7

Rule 19, Federal Rules of Civil Procedure 8

Rule 25(c) 1, 4, 5, 6, 8, 10, 11, 13, 14

Rule 25(a) 8, 10

Rule 25(a)(1) 2, 4, 5

Rule 38(5)(b) 3, 12, 13

Title 28 U.S.C. Sec. 1254 ..... 5, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

CHARLES RALPH JOHNSTON,
Petitioner,

vs.

DAVID McINTEE, etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This petitioner, Charles Ralph Johnston, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered in the above entitled cause on February 9, 1950, upon which a petition for rehearing was denied on March 10, 1950, and respectfully represents to this Court:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This case involves an interpretation of Rule 25(c) of the Federal Rules of Civil Procedure, relating to the motion of this petitioner to be substituted as party plaintiff

under a "transfer of interest" in the form of an absolute and outright conveyance of one-third of certain stock claimed by the original plaintiff in a proceeding *in rem.* This transfer of interest was made by the original plaintiff prior to the time the suit was filed in the District Court, and such interest later was transferred to petitioner subsequent to the filing of the proceeding *in rem.*

The ultimate question is whether the provisions of Rule 25(c) shall be limited by three novel conditions, none of which is actually contained in Rule 25(c) as now promulgated, to the effect that:

(1) The transferee may not be substituted under Rule 25(c) if the original transfer was not made *pendente lite* by the original party plaintiff, but was made prior to the time the suit was filed.

(2) The transferee may not be substituted under Rule 25(c) if his motion to be substituted is not filed prior to the time when the action otherwise would be dismissible under Rule 25(a)(1), even though the transferee's motion is made prior to the entry of any order of dismissal thereunder.

(3) The transferee may not be substituted under Rule 25(c), unless he is a transferee of the entire title to the property or chose in action sued for by the original party plaintiff.

Petitioner maintains that the imposition of each of the three foregoing restrictive conditions upon the operation of Rule 25(c) is in direct conflict with a decision or decisions in other Courts of Appeals on the same matter; and also creates a conflict upon a Federal question, that is, the proper interpretation of Rule 25(c) of the Federal Rules of Civil Procedure, which the Court of Appeals for the Seventh Circuit has interpreted in a manner probably

in conflict with applicable decisions of this Court. Petitioner further maintains that the imposition of each of the three foregoing conditions upon the operation of Rule 25(c) raises an important question of Federal law which is not already settled by this Court, and which should be settled upon this appeal.

Petitioner therefore asserts that this Petition for Certiorari falls squarely within the purview of Rule 38(5)(b) of this Court, and accordingly should be allowed.

This case comes before this Court upon a very simple record. Plaintiff, Reka Goldberg Hofheimer, brought an action *in rem* to recover 1,500 shares of preferred and 4,500 shares of common stock of The Hump Hair Pin Manufacturing Company (less 20 shares of preferred and 50 shares of common stock delivered to her shortly before her suit was filed on November 29, 1941) (Tr. 3-5). The defendants were alleged to be express, resulting, and constructive trustees for plaintiff of said 1,500 shares of preferred and 4,500 shares of common stock (Tr. 5). Plaintiff sued to have proper certificates evidencing such stock issued and delivered to her (Tr. 5-6), and for all income, proceeds and avails thereon to which she was entitled as the owner thereof up to the date of the issuance and delivery of such stock certificates to her (Tr. 6).

Defendants moved to strike the complaint for failure to state a cause of action (Tr. 13-14), the sole grounds alleged being that plaintiff's claim was barred by laches and limitations and by reason of certain bankruptcy proceedings (Tr. 14).

On September 24, 1941, two months before she filed her suit, plaintiff assigned 500 shares of preferred and 1,500 shares of such common stock to her attorney, Harold M. Keele (Tr. 17-23). Her attorney having entered the Armed Forces of the United States, and while plaintiff's said

suit was *pendente lite* in the District Court, he assigned said 500 shares of preferred and 1,500 shares of common stock to this petitioner on September 25, 1942 (Tr. 23-24).

On January 27, 1945, the original plaintiff, Reka Goldberg Hofheimer, died; but her death was not suggested to the District Court until June 17, 1947 (Tr. 14). On that day, plaintiff's prior death having been suggested of record, defendants moved that the cause of action be dismissed for failure of a successor or a representative of the deceased plaintiff to be substituted for her, such motion being made pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure (Tr. 14-15), citing *Anderson* v. *Yungkau,* 329 U. S. 482.

On July 25, 1947, before this motion had been acted upon, this petitioner filed his motion under Rule 25(c) to be substituted as a party plaintiff, and that the suit proceed in petitioner's name either as the sole plaintiff or as a co-plaintiff (Tr. 16-25). Petitioner's moving papers and amended pleading were all in accordance with Rule 25(c), and clearly stated that petitioner was "the sole and absolute legal and equitable owner" of the 500 shares of preferred stock and 1,500 shares of common stock previously assigned to him (Tr. 18-19).

On February 4, 1948, the District Court denied petitioner's motion to be substituted as transferee under Rule 25(c), granted defendants' motion to dismiss, and ordered that the cause be finally dismissed (Tr. 32).

Petitioner thereupon perfected his appeal to the United States Court of Appeals for the Seventh Circuit, which subsequently affirmed the District Court's order of final dismissal (Tr. 51). The principal ground stated in the Court of Appeals' opinion was that petitioner was not the transferee of the entire *res* involved (Tr. 50). The opinion also held that the District Court had no jurisdiction to

permit petitioner's substitution as transferee, because the motion to be substituted under Rule 25(c) was not based upon a transfer *pendente lite* (Tr. 51), and was not made before the action became dismissible as to the original plaintiff for failure of her representative to continue the prosecution of the litigation within the two-year period permitted by Rule 25(c), as construed by the *Anderson* v. *Yungkau* case (Tr. 49-50).

BASIS FOR JURISDICTION OF THIS COURT.

This Court's jurisdiction is invoked pursuant to Title 28, U. S. Code, Section 1254.

THE QUESTIONS PRESENTED.

I.

Whether a transferee *pendente lite,* but whose assignor became a transferee prior to the filing of an action *in rem,* may be substituted under Rule 25(c).

II.

Whether a transferee may be substituted under Rule 25(c) at any time prior to the actual dismissal of the proceeding in the District Court, even though such action is dismissible (but has not actually been dismissed) under Rule 25(a)(1).

III.

Whether a transferee by an absolute assignment of a part of the *res* sued for by the original plaintiff in an action *in rem* may be substituted under Rule 25(c), even though such transferee does not claim to be the assignee of the entire *res* involved.

REASONS FOR ALLOWANCE OF WRIT.

I.

It was unequivocally held by the Fifth Circuit Court of Appeals in *Dryden* v. *Land Investment Co., Inc.*, 127 F. 2d 586, that a transferee may be substituted under Rule 25(c), even though the original assignment to the transferee occurred prior to the filing of the action.

It is impossible to reconcile the interpretation of Rule 25(c) by the Fifth Circuit in the *Dryden* case with the opinion of the Seventh Circuit in the case at bar.

II.

It was unequivocally held by the Fourth Circuit in *Hood* v. *Bell*, 84 F. 2d 136, in a unanimous opinion written by Judge Parker, that even though an action is dismissible in the District Court, it is reversible error for the District Court to enter an order dismissing the same after a transferee has moved to be substituted for a party litigant prior to the time the order of dismissal was entered.

It is impossible to reconcile the interpretation of Rule 25(c) by the Fourth Circuit in the *Hood* case with the opinion of the Seventh Circuit in the case at bar.

III.

The language of the instrument of absolute assignment under which petitioner claims to be the absolute owner of 500 shares of preferred and 1,500 shares of common stock constituting part of the *res* involved in this action *in rem* is that Reka Goldberg Hofheimer, the original plaintiff,

> "does hereby grant, bargain, sell, convey, assign, set over, transfer and deliver"

the said 600 shares of preferred and 1,600 shares of common stock "now owned by her" (Tr. 21).

Defendants made no motion under Rule 12 of the Federal Rules of Civil Procedure to require the joining of Harold M. Keele as original assignor; or of this petitioner as subsequent assignee, under Rule 17, requiring that "every action shall be prosecuted in the name of the real party in interest."

This Court held in Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, and in Edward B. Marks Music Co. v. Jerry Vogel Music Co., 140 F. 2d 266, that the failure of the defendants to make a seasonable objection to the non-joinder of the original or subsequent assignee constituted a waiver thereof. Moreover, it was held in Kardo Co. v. Adams, 231 Fed. 950, that it is reversible error for the District Court to raise this objection on its own motion and to dismiss the action.

Further, in *Talmadge* v. *U. S. Shipping Board*, 54 F. 2d 240, and many other cases, it has been held that an assignment, absolute in form (as is each assignment in this case), passes full title to the assignee for purposes of suit, even though the assignee holds such title as security. See *Barnes* v. *Alexander*, 232 U. S. 117; *Brown* v. *Fletcher*, 235 U. S. 589, 237 U. S. 583; *Western Powder Mfg. Co.* v. *Brewerton Coal Co.*, 81 F. 2d 85, cert. den. *Cent. Ill. Elec. & Gas Co.* v. *Mfrs. Fin. Co.*, 299 U. S. 549.

Similarly, it has been held that the holder of an equitable lien may sue to enforce the same, even though such holder is not the owner of the entire *res* involved. *See Walker* v. *Brown*, 165 U. S. 654; *Fourth Street Nat. Bank* v. *Yardley*, 165 U. S. 634; and *Haas* v. *Rendleman*, 62 F. 2d 701, cert. den. 289 U. S. 750. These cases also hold that a partial assignee may sue in his own name, the other interested parties being then subject to being joined if

required by the District Court under Rule 19 of the Federal Rules of Civil Procedure. (*See Dulles* v. *Crippen Mfg. Co.*, 156 F. 706; *Chase Nat. Bank* v. *Sayles*, 11 F. 2d 948, cert. den. 273 U. S. 708; *Rogers* v. *Pennobscot Mining Co.*, 154 F. 606.)

Perhaps it should also be added that it has always been the law that an allegation of absolute ownership is held to be sufficient in and of itself as an allegation of fact. *O'Keefe* v. *Cannon*, 52 Fed. 898; *George Adams & Frederick Co.* v. *South Omaha Nat. Bank*, 123 F. 641; *In re Noble*, 21 Fed. Supp. 840; *Foss* v. *People's Gas Light Co.*, 241 Ill. 238.

It is impossible to reconcile the holding in the opinion of the Court of Appeals in the case at bar, that petitioner has no right of intervention under Rule 25(c) because "he is not the owner of the entire *res* involved," with the decisions of this Court and the several Courts of Appeal in the foregoing cases.

This Court granted certiorari in the *Anderson* v. *Yungkau* case (329 U. S. 482) solely for the reason that it involved an interpretation of Rule 25(a) of the Federal Rules of Civil Procedure. Certiorari has been granted in many other cases involving interpretation of the Federal Rules. In the case at bar, not only is Rule 25(c) squarely before this Court for interpretation; but the Court of Appeals' opinion sought to be reviewed herein purports to engraft three novel conditions upon that Rule, which are in direct conflict with the decisions of other Courts of Appeals on the same matters, as well as in conflict on Federal questions with applicable decisions of this Court. This appeal, moreover, involves an important question of Federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

CHARLES RALPH JOHNSTON
and HECTOR A. BROUILLET
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

CHARLES RALPH JOHNSTON,
Petitioner,

vs.

DAVID McINTEE, etc., et al.,
Respondents.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

OPINIONS BELOW.

The District Court did not prepare or publish a formal opinion. The opinion of the Court of Appeals has not yet been published; but appears in the Transcript of Record at pages 47 to 51.

JURISDICTION.

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254.

STATEMENT OF THE CASE.

A concise statement of the case containing all that is material to a consideration of the questions presented, with appropriate page references to the printed record, is set forth on pages 1 to 5 of our Petition for Writ of Certiorari, above, and for brevity is not here repeated.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in not reversing the order of dismissal by the District Court, and directing that petitioner be substituted as party plaintiff.

The Court of Appeals further erred in holding that a transferee may not be substituted under Rule 25(c), unless the original transfer was made *pendente lite*.

The Court of Appeals further erred in holding that a transferee may not be substituted under Rule 25(c) after a motion for dismissal has been made under Rule 25(a), even though no order of dismissal had been entered prior to the transferee's application under Rule 25(c).

The Court of Appeals further erred in holding that a transferee may not be substituted under Rule 25(c), unless he is the owner of the *entire res* involved.

ARGUMENT.

I.

The case of *Dryden* v. *Land Investment Co., Inc.*, 127 F. 2d 586, by the Fifth Circuit Court of Appeals, squarely holds that a transferee under an assignment made prior to the filing of the original action, not *pendente lite*, may nevertheless be substituted under Rule 25(c).

There is nothing in Rule 25(c) which limits the right of a transferee to be substituted thereunder merely because such transferee acquired his interest *pendente lite* from a prior transferee whose rights arose by an original assignment made before the filing of the original action. To impose such a condition upon the operation of Rule 25(c) in defiance of the *Dryden* case is an arbitrary limitation of Rule 25(c) which does not accord with the meaning or purpose thereof. No valid ground was stated in the Court of Appeals' opinion for arbitrarily inserting such a condition in Rule 25(c). The theory of the Federal Rules of Civil Procedure is that they will do essential justice between the parties; and will not deprive any litigant of his day in court upon any such narrow and technical ground as the imposition of the condition here referred to.

In view of the square conflict on this point, between the opinion and decision in the *Dryden* case and the opinion of the Court of Appeals in the case at bar, it is submitted that certiorari should be allowed by this Court.

II.

An examination of Rule 25(c) will show with equal clarity that there is no language therein which justifies the District Court in dismissing an action when, as in the case at bar, the transferee has moved under proper pleadings to be substituted under Rule 25(c) before the entry of any order of dismissal and while the case is still pending and undetermined in the District Court.

The decision in *Hood* v. *Bell,* 84 Fed. 2d 136, Fourth Circuit, by Judge Parker speaking for a unanimous court, is squarely to the effect that even though an action is dismissible, nevertheless it is reversible error for the District Court to enter an order of dismissal if the transferee has made his motion for substitution prior to the time the order of dismissal was entered, as in the case at bar. The Court of Appeals for the Seventh Circuit, in the instant case, argues in a circle when it says that the order to dismiss should be entered under Rule 25(a), as interpreted by this Court in *Anderson* v. *Yungkau,* 329 U. S. 482, merely because *after such order of dismissal was entered* the District Court "had, *thereafter,* no jurisdiction."

Again petitioner urges upon this Court that it is improper to restrict the applicability of Rule 25(c) upon any such narrow, technical ground as this, when the Rule contains no such limitation whatever.

In any event, the square conflict between the unanimous opinion of the Fourth Circuit by Judge Parker in the *Hood* case and the opinion of the Seventh Circuit in the case at bar is a conflict which justifies the issuance of the writ of certiorari upon this application under Rule 38 (5)(b) of this Court.

III.

In the light of the Federal authorities cited in our Petition for Certiorari, under Point III of the Reasons for Allowance of Writ above, it is unnecessary to again cite the same authorities at this point in this argument.

This Court and the Courts of Appeal have repeatedly held that *a partial assignee by an outright instrument of assignment,* or an absolute assignee for purposes of security, or even the holder of no more than an equitable lien, may sue to enforce his contractual rights in a *res* which is the subject of an action *in rem,* even though he is not the owner of the entire *res* involved and is not an assignee of the whole *res.* The opinion of the Court of Appeals for the Seventh Circuit in the instant case holds directly contrary (Tr. 50) to these decisions, cited under our said Point III.

This is a fundamental error which cannot be supported by any decisions of the Federal Courts, so far as petitioner is aware. Again this misinterpretation of Rule 25(c) by the Seventh Circuit, which is based upon such error, falls squarely within the purview of Rule 38(5)(b) of this Court, and justifies the granting of the petition for the writ of certiorari upon this application.

CONCLUSION.

The true and proper construction of Rule 25(c), like the true and correct construction of the other Federal Rules of Civil Procedure, especially in an appeal from an opinion of a Court of Appeals which purports to deny a right to a party litigant upon jurisdictional grounds which do not appear in the Federal Rules, is a matter which amply justifies this Court in allowing certiorari in this case.

Moreover, as we have shown above, not one of the three novel conditions engrafted by the Seventh Circuit upon Rule 25(c) as the ground for denying the District Court's jurisdiction in this action is supported by any decision of any other Court of Appeals or of this Court. Finally, as we have shown above, each of such conditions so imposed is in direct conflict with cases previously decided in this Court and in the other Courts of Appeals.

In order that there may be a proper construction of Rule 25(c) of the Federal Rules of Civil Procedure, and also in order that there may be uniformity in the holdings of the Federal Courts as to jurisdictional grounds, this Court should grant to this petitioner the writ of certiorari to review the instant decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

CHARLES RALPH JOHNSTON,
and HECTOR A. BROUILLET,
Attorneys for Petitioner.

FILED
JUL 17 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 118

CHARLES RALPH JOHNSTON,
Petitioner,

vs.

DAVID McINTEE, ETC., ET AL.,
Respondents.

RESPONDENTS' OPPOSING BRIEF.

CLAUDE A. ROTH,
HARRY E. SMOOT,
GOTTLIEB, SCHWARTZ & FRIEDMAN,
Attorneys for The Hump Hairpin Manufacturing Company, a corporation, and Chain Store Products Corporation, a corporation, respondents.

LOUIS M. MANTYNBAND,
GEORGE L. SIEGEL,
ARVEY, HODES & MANTYNBAND,
Attorneys for David McIntee, Theodor Lange, Irving Richard Green and Ruth K. Goldberg, individually and in the capacities sued, respondents.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	PAGE
Statement of the Case	1
Questions Presented	3
Argument	4

TABLE OF CASES.

Anderson v. Yungkau, 329 U. S. 482	5
Dryden v. Land Investment Co., 127 F. (2d) 586	4
Hofheimer v. McIntee, 40 F. (2d) 363, 366	2
Hood v. Bell, 24 F. (2d) 136	5

RULES.

Rule 25(a)(1)—Federal Rules of Civil Procedure	5
Rule 25(c)—Federal Rules of Civil Procedure	5